Office-Supreme Court, U.S.
FILED
MAY 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1309~~ 126

STANLEY M. UNGER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Stanley M. Unger, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction entered by the United States District Court for the Southern District of New York on May 4, 1965.

OPINIONS BELOW

The majority and concurring opinions in the court of appeals, not yet reported, are printed in the appendix to this petition (App. 1a-27a). No opinion was written by the district court.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1966. Petition for rehearing or alternatively rehearing *in banc* was denied on March 14, 1966. On March 22, 1966, Justice Harlan entered an order extending the time for filing a petition for certiorari to and including May 11, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the decision below is in direct conflict with this Court's decision in *Stirone* v. *United States*, 361 U.S. 212 (1960).

2. Whether a federal criminal defendant is entitled to a jury trial on the jurisdictional element of the offense charged by the grand jury; and whether the court of appeals erred in denying petitioner such a right in the trial of an indictment for alleged violations of section 302 of the Taft-Hartley Act, 29 U.S.C. § 186.

3. (a) Whether facts essential to sustain a conviction under the indictment may be judicially noticed by majority vote of the court of appeals, where no evidence of such facts or request that they be judicially noticed was presented before the district judge or jury.

(b) Whether petitioner was deprived of his Fifth Amendment right to due process, or his Sixth Amendment rights to jury trial, cross-examination, confrontation, and to introduce evidence in his own defense, by the action of the court of appeals in taking judicial notice of unproven facts essential to sustain the charges of the indictment.

(c) Whether such action by the court of appeals conflicts with this Court's ruling in *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

STATUTES INVOLVED

29 U.S.C. § 186, comprising § 302 of the Labor Management Relations Act of 1947 (the Taft-Hartley Act) as amended by the Labor Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act) provides in pertinent part as follows:

> "§ 186. *Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.*
>
> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee di-

rectly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2). . . .

(c) [Exceptions]. . . .

(d) Any person who wilfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdeameanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * * "

29 U.S.C. § 142, enacted as § 501 of the Labor Management Relations Act of 1947, provides in pertinent part as follows:

"§ *142. Definitions*

When used in this chapter—

(1) The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

* * * * *

(3) The terms 'commerce,' 'labor disputes,' 'employer,' 'employee,' 'labor organization,' 'representative,' 'person,' and 'supervisor' shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter."

29 U.S.C. § 152(6), incorporated by reference in 29 U.S.C. § 142(3), *supra*, provides as follows:

"*152. Definitions*

When used in this subchapter—

* * * * *

(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

STATEMENT

Petitioner, Stanley M. Unger, Secretary-Treasurer of Local 32-E of the Building Service Employees International Union, was convicted upon three of the six counts upon which he was indicted for alleged violations of the Labor-Management Relations Act, 29 U.S.C. § 186. The verdict followed a two-day jury trial before the Honorable Thomas F. Murphy, J., in the United States District Court for the Southern District of New York. Petitioner was sentenced to

one year's imprisonment on each of the three counts, the sentences to run concurrently. (R. 4a, 184a-85a.)[1]

The questions presented by this petition arise out of the action of the district court in erroneously instructing the jury on the jurisdictional element of the Taft-Hartley Act offenses charged against petitioner, and the action of the court of appeals in holding: (1) that petitioner was not prejudiced by the erroneous instruction because the jurisdictional element should have been determined by the trial judge as a matter of law instead of being submitted to the jury; (2) that the jurisdictional element was established by "undisputed evidence" plus other facts which the court of appeals' majority judicially noticed although they had not been the subject of proof or judicial notice below. (See App. 4a, 10a-11a, 21a-25a.)

The indictment in this case comprised twenty-three counts, but only counts 16-21 named petitioner. Counts 1-15 and 22-23 contained similar charges of Taft-Hartley violations against Vincent J. Ricciardi and Fred Meyer, respectively, who were officers of the same local union as petitioner. (R. 9a-12a.) The three defendants were tried separately. Meyer's case ended in a mistrial (R. 3a). Ricciardi was convicted following a jury trial before Judge Weinfeld (R. 5a).

Upon motion of the government the argument of the appeals of Ricciardi and of Unger was consolidated. The court of appeals affirmed both convictions in the same opinion, but with different reasoning as to each of the appellants (App. 1a-27a). Ricciardi's petition for certiorari is presently pending before this

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[1] Record references are to the printed appendix of the appellant Unger in the court of appeals, unless otherwise indicated.

References to the opinion of the court of appeals, printed in the appendix to this petition, are preceded by the citation "App."

Court as No. 1171, October Term, 1965. In view of the important differences between the trials of the two cases in the district court,[2] and in the reasoning of the appellate court in affirming the separate convictions, the questions presented by this petitioner are essentially different from those presented by the petitioner Ricciardi in No. 1171. For this petitioner contends that the jury instructions on the jurisdictional element of the offense given by Judge Weinfeld in Ricciardi's trial correctly construed the jurisdictional requirements for a conviction under the statute, and (if the evidence was sufficient to take the case to the jury) should have been given as requested in petitioner's trial. However, petitioner also contends, as does Ricciardi, that because of the government's failure to introduce essential evidence on the jurisdictional element of the offenses it did not prove a prima facie case for submission to the jury.[3]

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[2] The affidavit of government counsel in support of the motion to consolidate in the court of appeals stated in part:

> "Each appeal raises a question of first impression and great complexity, to wit, the scope of the jurisdiction of Title 29, United States Code, Section 186. Judge Murphy and Judge Weinfeld differed in their interpretations of this statute and consequently the Government's proof on the federal jurisdictional element of the crime was to some extent different at each trial. Judge Murphy permitted the Government greater latitude on this element. The charge to the jury in each case, therefore, was different to this extent." (Affidavit dated Sept. 20, 1965, par. 3.)

[3] The court of appeals noted the absence of "any testimony to the effect that a strike or slow-down by the superintendents would affect the purchase of fuel used in" the buildings organized by Local 32-E (App. 10a). The appellate court found it necessary to take judicial notice of the effect of such a strike in order to sustain the conviction (App. 10a-11a; see 22a-25a). If petitioner is correct in his contention that the question of a strike's effect was one for the jury instead of for judicial notice, it follows that the government's case was devoid of necessary testimony.

The counts naming petitioner read in their entirety as follows:

"On or about the dates hereinafter set forth, in the Southern District of New York, Stanley M. Unger, the defendant, *a representative of employees who were employed in an industry affecting commerce*, to wit, Secretary-Treasurer, Local 32-E, Building Service Employees International Union, did unlawfully, wilfully and knowingly request, demand, and receive and accept and agree to receive and accept from *the employers of the aforesaid employees,* as hereinafter set forth, a thing of value, to wit, money and loans in the amounts as hereinafter set forth:

Count	Dates	Employer	Thing of Value
16	November 18, 1959	Joseph Wasserman	$ 150
17	December 16, 1959	Joseph Wasserman	$ 150
18	April 19, 1961	Jerome R. Jakubovitz	A loan of $3000
19	May 7, 1962	Jerome R. Jakubovitz	A loan of $2000
20	December 21, 1962	Zachary Feiber	$ 100
21	December 20, 1963	Zachary Feiber	$ 200

(Title 29, United States Code, Section 186)" (R. 10a-11a; emphasis supplied.)

Of these six counts, one was dismissed at the commencement of trial (count 20, R. 25a); the jury disagreed as to two (16 and 17) and convicted petitioner upon three (18, 19 and 21). (R. 161a.) The two counts on which the jury hung were those upon which petitioner denied the receipt of any money from the complainant landlord.[4]

[4] The testimony of the landlord Wasserman that he made the alleged payments to petitioner appears at pp. 44-46 of the trial transcript, and appellant's denial of Wasserman's account at pp. 168-75 of the trial transcript. As these counts were not involved in the appeal, this testimony does not appear in appellant's printed appendix.

With respect to counts 18 and 19, there was no disagreement between the testimony of the complainant landlord and of the defendant that the alleged loans had been made.[5] Rather, the opening statement of defense counsel, prior to introduction of evidence by either party, had stated:

> "For instance, there is evidence here of loans from a Mr. Jakubovitz. We are not going to contest the loans, that they were made is admitted. What we contest, however, is the fact that Mr. Jakubovitz is not engaged in industry affecting commerce. We will hope to demonstrate this to you in the course of the trial." (R. 31a.)

On count 21, petitioner likewise did not dispute physical receipt of a sum from the employer, but did dispute the jurisdictional allegation that the employer had employees "in an industry affecting commerce." (See R. 151a-53a.)[6]

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[5] Both Jakubovitz and petitioner testified that the loan was made because of their longstanding personal friendship, and that neither thought at the time that the loan was improper (R. 64a, 66a, 117a, 123a). The ruling of the district court, that the parties' friendship and lack of criminal intent would be irrelevant, and therefore was not a question for the jury (R. 136a, 153a, 158a), was affirmed by the court of appeals (App. 16a). This aspect of the decision below is not raised in this petition.

[6] The testimony raised a further issue: whether in delivering Christmas gifts from the employer to employees of the local petitioner "was merely acting as a conduit to your generosity", as the employer originally testified under questioning by the Court (R. 77a); or whether, as the employer later testified (R. 78a), $50 of the sum given for delivery was for petitioner's own use. The holding of the court of appeals, that the evidence was sufficient for the jury to resolve this factual question against petitioner (App. 18a), is not challenged in this petition.

Evidence on the Jurisdictional Element

The government's proof of the jurisdictional element of each count—that the employees were "employed in an industry affecting commerce"—rested upon the testimony of the union's president, Henry Chartier, and a stipulation read into evidence. (R. 85a, 182a-83a; see App. 10a.)

Chartier testified as to the scope of the union's activities, including its organization of apartment house employees in the Bronx and in Westchester County, of country club employees in Westchester, of employees at Yonkers Raceway and Aqueduct Raceway, at "Freedomland in the Bronx" at "Klein's department store," and in service trades such as electrical and plumbing repairs, carpentry and masonry (R. 34a-36a). Chartier further testified that No. 6 oil was generally used by landlords in the Bronx (R. 36a), and the landlords named in the indictment testified that their buildings used oil (R. 61a, 75a). The only testimony regarding the superintendents' connection with fuel oil was Chartier's answer to the prosecutor's leading question:

> "Q. So most of the other members of Local 32-E are building superintendents; is that correct? A. That is correct.
>
> Q. And do the building superintendents have the duty to service the heat of the buildings? A. That is correct." (R. 36a.)

The remaining proof on the jurisdictional element consisted of the stipulation as to testimony which "the appropriate witnesses" for the government would give, if called:

"1. That the horses used at Yonkers Raceway, Westchester County, New York, include horses coming from outside of New York State which cross State lines to get to the Yonkers Raceway.

2. That the oil, coal and gas used as fuel in (a) the apartment dwellings and (b) the country clubs in (a) Bronx County and (b) Westchester county have come from outside of New York State, crossing state lines to enter New York State.

3. That the landlords in (a) Bronx County and (b) Westchester County purchase such fuels from local distributors.

4. *That the foregoing witnesses, if asked, could not testify whether or not the volume of such fuels purchased or consumed in (a) Bronx County and (b) Westchester County was affected by activities of Local 32-E, Building Service Employees International Union,* because the United States Department of Commerce does not keep such information and they know of no other source of such information.

5. It is further stipulated that none of the witnesses referred to in this stipulation appeared before the Grand Jury or gave statements producible under 18 U.S.C. 3500, in this case." (R. 85a, 182a-83a; Gov. Ex. 27; emphasis supplied.)

Upon the motion for acquittal at the close of the government's evidence, Judge Murphy agreed with the contention of defense counsel:

"[Defense counsel]: In this case, your Honor, there is not one iota of evidence introduced by the government as to what the effect of a labor dispute would be upon any activities of commerce or any activities of the employers in this case.

The Court: That's correct." (R. 94a-95a.)

Judge Murphy adhered to the same view in ruling upon instructions after the close of all the evidence. (R. 132a; see also App. 22a-23a at n. 4.)

At the conclusion of the government's case (R. 102a), and again at the conclusion of all the evidence (R. 132a), Judge Murphy reserved decision on the motion for judgment of acquittal. Judge Murphy noted that the issue of whether the "industry" should be defined to include all employers with whom the union deals "is the real question in the case." (R. 95a.) That interpretation, advocated by the government, presented a serious constitutional question in Judge Murphy's view (R. 96a-98a). In finally denying the motion for acquittal and post-trial motions,[7] Judge Murphy reiterated that he did so "with some misgivings, because I do think it poses a very serious question, a number of serious questions." (R. 170a.)

Jury Instructions

In ruling upon requested instructions, as in ruling upon motions for judgment of acquittal and for dismissal for lack of jurisdiction, and ruling on admissibility of evidence (R. 26a-27a, 34a), Judge Murphy rejected the defendant's contention that 29 U.S.C. § 186(a) (1) and (b) (1) required the government to establish that employees of the landlord employers named in the indictment were "in an industry affecting commerce." Although the court of appeals later held that defendant's construction of the statute and requested charge embodied "the correct jurisdictional

[7] Prior to trial Judge Murphy reserved decision on defendant's motion to dismiss the indictment for lack of jurisdiction of the subject matter (R. 16a, 23a). The motion, having been renewed after trial (R. 174a-75a), was then denied (R. 170a).

test" (App. 9a),[8] the trial court adopted a broader test: "whether the employers of all the employees in the union are in an industry affecting interstate commerce." (R. 151a; see also R. 95a.) Under this test the jury was allowed to predicate jurisdiction upon the interstate aspects of non-housing enterprises whose employees were represented by the union, such as Yonkers Raceway, Klein's department store, and Westchester country clubs. (See App. 9a, 21a-22a; R. 26a-27a, 29a, 34a, 36a, 95a-96a, 146a-47a, 151a.) The narrower test urged by defendant, the judge informed the jury was erroneous (R. 151a).

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[8] By contrast the government had requested the following charge on the jurisdictional issue:

"Request No. 8

Employees were Employed in an Industry Affecting Commerce

The Government must prove that Local 32-E, BSEIU, was a labor organization engaged in an industry affecting commerce. You may recall that Henry Chartier, President of Local 32E, testified that 32E has members that service numerous apartment houses and clubs, which in turn use fuel which is shipped interstate. Further that its members include the mutuel clerks at Yonkers Raceway and service and maintain the facilities at the Raceway. He further testified that they maintain Aqueduct Raceway and supply various skilled labor such as electricians, carpenters and boiler repairmen.

I instruct you, that if you find that these various buildings and services deal with fuel, horses or other material that are part of shipment between states, then Local 32E was a labor organization in an industry affecting commerce.

Sheet Metal Con. Ass'n. v. *Sheet Metal Ass'n.*, 248 F.2d 307, 311 (9th Cir. 1957);

United States v. *Alaimo*, 191 F. Supp. 625, 628 note 6 and cases cited therein (M.D. Pa. 1961)."

In his charge Judge Murphy submitted the jurisdictional element of the offense to the jury in the following terms:

> "Each of the five crimes have four elements, each of which must be proved by the government beyond a reasonable doubt.
>
> (1) . . . .
>
> * * *
>
> (4). *That the employees were employed in an industry affecting commerce between the states.*
>
> I think the only words that need any explanation are 'an industry affecting commerce.'
>
> Congress has, in the statute, defined the term, 'commerce' to mean trade, traffic, commerce, transporation or communication among the several states. 'Industry' means business.
>
> *It is the government's claim in this case that the employees of the employers are in an industry affecting commerce because all of the landlords who have contracts with Local 32-E to a very large extent use oil for heating of their apartment houses, which oil comes from places outside the State of New York, and because the employers who own or operate the Yonkers Raceway cause horses to be transported from states outside the State of New York, and because the department store, Klein's, deals in goods that come from many, many places.*
>
> The defendant argues, as I understand his argument, that the employers described in the indictment—that is, Mr. Wasserman and Mr. Jakubovitz and Mr. Fieber—do not have any employees that are engaged in an industry affecting commerce and that their business is purely local. But that is not the test, gentlemen. As I said before, the test is not as to how much interstate business any particular employer may do but rather

whether the employers of all the employees in the union are in an industry affecting interstate commerce.

So your first and most important consideration is the determination whether the government has, with regard to each count, proved beyond a reasonable doubt that the employees of the various employers who have contracts with Local 32-E are employed in an industry affecting commerce.

If you find that the government has failed to prove that element, it necessarily must have failed to prove it with regard to each count, and your sworn duty is to return a verdict of not guilty, because no federal crime could be committed. If you determine that the government has proved that element, your next important question is whether the defendant was a representative of the employers' employees at the time it is alleged that each crime was committed." (R. 150a-151a; emphasis supplied.)

Defendant excepted to the charge on this element of the offense; the government did not. (R. 157a, 159a.)

By contrast, in the trial of Ricciardi, Judge Weinfeld limited the jury's consideration to the small apartment house industry in the Bronx—instead of including non-landlord employers whose employees were organized by Local 32-E—*and submitted to the jury the question of whether a labor stoppage or strike would interfere with the volume of interstate fuel shipments.*[9]

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[9] Judge Weinfeld charged:

"As to the second element—that the employees represented by the defendant were engaged in an industry affecting commerce—the defendant challenges that such is their status. Accordingly the government has the burden of establishing that the employees were engaged in an industry affecting commerce, and unless it does there would be no federal jurisdiction.

For the purposes of this trial, the ownership, operation and

Judge Murphy did not submit the latter issue to the jury, because as he ruled in the colloquy on instructions: "There is no testimony in the case about a labor dispute or a strike." (R. 132a). Judge Weinfeld's instruction in this respect has recently been approved as correct in the government's Brief in Opposition to certiorari in the *Ricciardi* case. *Ricciardi* v.

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management of apartment houses in The Bronx of 30 or less apartments may be considered an industry. The question remains whether that industry is one affecting commerce—more specifically whether the employees represented by Council 7 are in such an industry.

The law defines 'industry affecting commerce' to mean:

> 'Any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.'

* * * * *

If, upon all the evidence, you find that the purchase, sale, transportation or distribution of fuel originating outside the state, and normally required by the industry, would be interfered with by a stoppage or strike, then you have sufficient upon which to find that it is an industry affecting commerce.

Putting it another way, if the necessary effect is that interstate commerce feels the pinch—that the free flow, sale and distribution of fuel from without the state would be adversely interrupted or curtailed on other than a de minimis basis—then the fact that the initial squeeze is made locally here in The Bronx upon the industry members does not matter.

The short of it is, if action directed against the apartment house owners here results in a diminution of the fuel coming into the state, and either directly or indirectly affects the free flow of commerce or burdens or obstructs commerce, *then the industry is one affecting commerce.*

In your determination of this issue you consider the demand for fuel not on the basis of the purchase by any one owner, but by all the owners similarly situated." (Appellant Ricciardi's Appendix 114a-117a; emphasis supplied.)

United States, No. 1171, Oct. Term 1965, Brief in Opposition, pp. 7-8.[10]

Court of Appeals Ruling

The court of appeals agreed that the jurisdictional test embodied in defendant's requested instruction had been correct, and that the instruction given by Judge Murphy was erroneous. (App. 9a-10a, 21a-22a). It thus resolved in petitioner's favor what Judge Murphy had considered "the real question in the case." (R. 95a.) However, it affirmed on the theory that petitioner was not prejudiced because the jurisdictional issue should not have been submitted to the jury at all. In the majority's view, jurisdiction was established "as a matter of law" by "undisputed evidence" plus the appellate court's judicial notice of the effect that a superintendents' strike in the Bronx and Westchester would have on purchases of out-of-state fuel.

> "The indictments against both Ricciardi and Unger were phrased in terms of subsections (b) (1) and (a) (1) of 29 U.S.C. § 186 . . . . *The jurisdictional test for the cases against both appellants is therefore: are any of the employees of the employers who made the payments 'employed in an industry affecting commerce'?* 29 U.S.C. § 142 (1) defines 'industry affecting commerce' as 'any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or the free flow of commerce'; and 'commerce' in turn is defined by 29 U.S.C. § 152(6) to mean 'trade . . . among the several States . . .'

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[10] In the *Ricciardi* Brief in Opposition the government appears to avoid committing itself as to whether the trial court should submit "'to the jury the jurisdictional question of what constitutes an 'industry affecting commerce' ". See *id.* at pp. 6-7 and n. 4.

Although in both cases now before us the jurisdictional question was submitted to the jury, the question of what activities constitute an 'industry affecting commerce' under 29 U.S.C. § 186 has almost always been regarded as a question of law for the court to decide, leaving to the jury only the determination of what activities the defendant had in fact engaged in. United States v. *Gibas,* 300 F. 2d 836, 839 (7th Cir.), *cert. denied,* 371 U.S. 817 (1962); *United States* v. *Pecora,* 173 F. Supp. 764 (W.D. Pa. 1958), *affirmed,* 267 F. 2d 512 (3d Cir. 1959); see *United States* v. *Donovan,* 339 F. 2d 404, 410 (7th Cir. 1964). *The same allocation of function between court and jury has also been made under the similar Hobbs Act, 18 U.S.C. § 1951, which proscribes the obstruction of commerce by robbery or extortion.* [Citations omitted.]

* * * * *

Unger's challenge to jurisdiction under the statute raises somewhat different problems than Ricciardi's similar challenge, since different evidence was introduced in support of jurisdiction and since the trial judge's conception of the proper jurisdictional test differed from the test used by the judge before whom Ricciardi was tried.

The indictment against Unger was couched in terms of 29 U.S.C. § 186(a)(1) and (b)(1), *under which the correct jurisdictional test is: are any of the employees of the employers who made the payments 'employed in an industry affecting commerce'? This was the test employed by the trial judge in Ricciardi's case. In Unger's case, however, the trial judge denied a requested charge to this effect,* and charged instead that the test is 'whether the employers of all the employees in the union are in an industry affecting commerce.' *The charge given permitted the jury to consider on the question of jurisdiction not only the fuel*

purchased by the apartment houses but also the out-of-state aspects of the racetracks and the department store at which members of other branches of Local 32-E were employed.

We believe that this instruction, although erroneous, was not prejudicial to Unger, because the undisputed evidence establishes jurisdiction under the statute as a matter of law.

The president of Local 32-E *testified without contradiction* that this local, which represented employees of the employers who made the payments to Unger, had organized approximately 5,500 apartment buildings in Bronx and Westchester Counties by 1959; that members of Local 32-E were superintendents of these buildings; and that the superintendents were responsible for servicing the heating systems in the buildings. It was stipulated between the parties that the oil, coal, and gas used as fuel in the buildings, although purchased from local distributors, came from outside of New York State.

The Government adduced no proof of the dollar volume of the fuel consumed in apartment buildings organized by Local 32-E; *nor was there any testimony to the effect that a strike or slow-down by the superintendents would affect the purchase of fuel used in these buildings.* But in the words of Coleridge, J., 'Judges are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with.' *Lumley* v. *Gye*, 2 El. & Bl. 216, 267, 118 Eng. Rep. 749, 768 (Q. B. 1853). In deciding what constitutes an 'industry affecting commerce' as a matter of law, *we may take judicial notice of the obvious and the indisputable.* It cannot be disputed that the amount of fuel used in 5,500 apartment buildings is substantial, and has a substantial dollar value. *Nor can it be disputed that a slow-down or strike by the superintendents who run the heating*

> *systems would affect the amount of fuel used in the buildings in a significant way.* Of course we cannot decide whether the effect would be long-lasting: the record affords no information, nor is it common knowledge, whether labor disputes in the apartment building industry in the Bronx and in Westchester are long-lasting, or whether landlords could run the furnaces themselves or get outside help in running them. But we need not decide that the effect upon interstate commerce would be drastic, before we can hold that the Government has satisfied the jurisdictional requirements of the statute. The statute requires only that a labor dispute in the industry would 'tend to burden or obstruct' interstate commerce, 29 U.S.C. § 142(1). Interpreting this phrase in light of the congressional intent that jurisdiction under the statute should be as broad as constitutionally permissible, jurisdiction is established as a matter of law if there is no question but that a labor dispute in the relevant industry would have a palpable effect on interstate commerce. Given the unquestioned evidence of the number of buildings involved and the responsibilities of the superintendents, *we can take judicial notice that a labor dispute involving the apartment buildings would have a palpable effect on interstate commerce.*" (App. 3a-4a, 9a-11a; emphasis supplied.)

In a concurring opinion, Judge Waterman rejected the majority's rationale but agreed with its result. Judge Waterman concurred "in the result reached by the majority on the ground that proof of effect on interstate commerce is not required on a case-by-case basis in prosecutions commenced under 29 U.S.C. § 186(a) and (b)." (App. 19a.) However, Judge Waterman agreed that no such proof had been presented at petitioner's trial, and that the proof could not have been supplied by judicial notice of an alleged

effect on fuel demand which Judge Waterman doubted would occur.

> "*It must be emphasized that at neither trial did the Government adduce any evidence tending to show that a labor dispute in the industry would in fact 'affect' commerce by reducing the industry's demand for fuel.* Indeed, in *Unger* the trial judge on several occasions noted that *there was no evidence relating to an effect on commerce in the case.*
>
> Though in affirming both convictions the majority concedes that it was necessary for the Government to establish in each case that a labor dispute in the apartment-house industry would 'affect' the industry's demand for fuel, *in order to excuse the Government's failure to prove 'affect' in either case, it invokes the rule that formal proof of facts known at once with certainty is not required.*
>
> * * * * *
>
> *I am not persuaded that it is common knowledge that a labor dispute in this industry would decrease the industry's demand for fuel. I should have thought it likely that all the landlords would rapidly make the minor adjustments necessary to operate the heating systems themselves; and that, if this were done, the industry's demand for fuel would not decrease.* This view prevents me from attributing to Ricciardi's jury the knowledge necessary to resolve the first issue affirmatively; likewise *I cannot join my brothers who believe it possible to take judicial notice of this fact.*" (App. 22a-24a; footnotes omitted, emphasis supplied.)

REASONS FOR GRANTING THE WRIT

1. The ruling of the court of appeals that the existence of the jurisdictional element of the offense was a question only for the court and not for the jury is

in direct conflict with this Court's decision in *Stirone* v. *United States,* 361 U.S. 212 (1960). The position of the court below is essentially that urged by the Solicitor General in this Court in *Stirone* and rejected by this Court's decision.

In holding that the jurisdictional element of the offense defined by § 302 of the Taft-Hartley Act, 29 U.S.C. § 186, should be determined "as a matter of law", the court below relied upon earlier decisions of courts of appeals under the Hobbs Act.

> "The same allocation of function between court and jury has also been made under the similar Hobbs Act, 18 U.S.C. § 1951, which proscribes the obstruction of commerce by robbery or extortion. *United States* v. *Green,* 246 F. 2d 155, 160-61 (7th Cir.), *cert. denied,* 355 U.S. 871 (1957); *United States* v. *Lowe,* 234 F. 2d 919, 922 (3d Cir.), *cert. denied,* 352 U.S. 838 (1956); *United States* v. *Varlack,* 225 F. 2d 665, 670, 672 (2d Cir. 1955); *Hulahan* v. *United States,* 214 F. 2d 441, 445-46 (8th Cir.), *cert. denied,* 348 U.S. 856 (1954); *Nick* v. *United States,* 122 F. 2d 660, 673 (8th Cir.), *cert. denied,* 314 U.S. 687 (1941)." (App. 4a.)

Each of these decisions under the Hobbs Act was rendered prior to this Court's decision in *Stirone,* which was not considered in the opinion below.

In *Stirone* the issue was whether the instructions allowed the jury's verdict to be predicated either upon a finding of the particular effect upon interstate commerce alleged by the grand jury in the indictment, or upon a finding of a different effect brought out in the evidence at trial. The Solicitor General, both in his opposition to certiorari and in point I of his brief on the merits, contended that the asserted error in the

instructions should not be considered because the jurisdictional element of the offense was established by undisputed evidence and therefore need not have been submitted to the jury at all. *Stirone* v. *United States,* No. 722, Oct. Term 1958, Brief for the United States in Opposition to Certiorari, pp. 9-11; *Stirone* v. *United States,* No. 35, Oct. Term 1959, Brief for the United States, pp. 16-20. The argument on the merits stated:

> "I. In This Case, the 'Commerce' Issue Did Not Give Rise to a Jury Question
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> The gist of the crime charged in this case is extortion. As we point out *infra* (pp. 21-25), it was the purpose of Congress to reach any extortion that comes within the scope of the federal commerce power. This means, to be sure, that there must be an effect or burden upon commerce for the case to be one within the federal jurisdiction. *But this is a jurisdictional requirement, not one which goes to the substance of the criminal conduct.*
>
> *We shall assume that it is appropriate to submit to the jury for its determination any factual issue which may underlie the determination as to effect upon interstate commerce.*[2] *We believe,*

"[2] This is characteristically done by charging a jury, 'If you believe that such and such transactions took place, then I charge you as a matter of law that there was an effect upon interstate commerce.' See, *e.g.,* the following cases arising under the Hobbs Act. *United States* v. *Green,* 246 F.2d 155, 160-161 (C.A. 7), certiorari denied, 355 U.S. 871; *Hulahan* v. *United States,* 214 F.2d 441, 445-446 (C.A. 8), certiorari denied, 348 U.S. 856; *United States* v. *Lowe,* 234 F.2d 919 (C.A. 3), certiorari denied, 352 U.S. 838; *United States* v. *Varlack,* 225 F.2d 665 (C.A. 2)." *Stirone* v. *United States, supra,* Brief for the United States, pp. 16-19 (footnotes 3 and 4 omitted, emphasis supplied).

however, that where there is no contested issue as to the operative facts (the facts as to transportation, shipments and the like) and the only question is the legal characterization to be given to the established course of commercial conduct, *there is no necessity whatever to submit to the jury the 'commerce' issue.* If we are correct in our contention that there was no need in this case to submit that issue to the jury at all and *that the sole function of the jury, in the circumstances, was to determine whether there was extortion,* it becomes unnecessary for the Court to consider whether the trial court erred in instructing the jury as to 'steel' commerce. Stated otherwise, if we are correct in Point I, the only remaining question is whether the evidence as to *either* aspect of commerce ('sand' commerce *or* 'steel' commerce) was legally sufficient to bring the case within the ambit of the Hobbs Act.

Our starting point is that there was *uncontroverted testimony* showing (1) that there were continuous sand movements from an out-of-state source to Rider, (2) that the sand was thereafter used by Rider to manufacture concrete, and (3) that the concrete was used in constructing a steel mill which engaged, in turn, in the production of goods for commerce.

* * * * *

Where, as here, there is no contested issue of fact underlying the jurisdictional issue and room only for argument as to the legal inferences to be drawn from the established facts, the matter, we submit, is one appropriate for determination by the court. As stated by the late Chief Judge Parker, 'One cause of failure in jury trials results from burdening juries with matters that they are not qualified to determine.' In a case arising under the Anti-Racketeering Act of 1934, predecessor of the present statute, Judge Learned Hand stated (*United States* v. *Compagna,* 146 F. 2d 524, 527 (C.A. 2), certiorari denied, 324 U.S. 867):

> * * * If these were the facts, the business was interstate as [a] matter of law, and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue. * * *"[11]

This Court's unanimous decision in *Stirone* reversed the conviction, holding that the instructions erroneously permitted the petit jury to convict upon an allegation as to effect upon commerce which the grand jury had not included in the indictment. This Court held that the jurisdictional element of a Hobbs Act crime is an essential element of the offense, upon which the grand jury and petit jury must concur:

> "Here, as the trial court charged the jury, there are *two essential elements of a Hobbs Act crime: interference with commerce,* and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. *The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference.*" 361 U.S. at 218 (emphasis supplied).

This Court plainly regarded the jurisdictional element as an "essential element" of the crime, and one which the jury must find under proper instructions. It necessarily rejected the Solicitor General's contention that the jurisdictional element was one for determination by the court and need not have been submitted to the jury. Otherwise the conviction would

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[11] Significantly, the Second Circuit, in the instant case, relied solely upon Hobbs Act authorities from other jurisdictions (App. 4a) but not upon its own prior decision in *United States* v. *Compagna,* cited in the quoted passage from the Solicitor General's brief in *Stirone.*

have been affirmed, since this Court did affirm the rulings below that the evidence was sufficient to establish federal jurisdiction under the Hobbs Act and that the jury could properly have so found. See *id.* at 215.

The *Stirone* conviction was reversed because the instructions erroneously allowed the jury to base its finding of the jurisdictional element upon facts not included in the indictment. The Court left open the question whether the coverage of the statute was broad enough to have permitted an indictment and conviction on the ground erroneously submitted to the jury. See *id.* at 215. In the instant case the court of appeals unanimously held that the jurisdictional test adopted in the district court's charge was broader than the statute permitted (App. 9a-10a, 21a-22a), thus allowing the jury's finding of the jurisdictional element to be based upon facts which the grand jury could not have properly included in the indictment.

There is no basis for giving the jury a more limited function in a Taft-Hartley Act than a Hobbs Act prosecution, or for limiting defendant's right to jury trial on one essential element of the offense under the one statute and not the other. Nor did the court below suggest such a distinction; it treated the two statutes as making "the same allocation of function between court and jury" (App. 4a).[12] Accordingly *Stirone* is

[12] In each of the three cases under the Taft-Hartley Act, 29 U.S.C. § 186, cited by the court below (App. 4a), the jury was left to determine under appropriate instructions whether the jurisdictional element was proved. The trial court merely performed the orthodox function of instructing the jury that, if the jury made certain findings from the testimony, those findings would establish an element of the offense. *United States* v. *Gibas*, 300 F.2d 836, 839 (7th Cir.), cert. denied, 371 U.S. 817 (1962); *United States* v. *Pecora*, 173 F. Supp. 764, 766 (W.D. Pa. 1958), *affirmed*,

indistinguishable from the instant case, and the rejection of the Solicitor General's position there compels a rejection of the same position in the opinion of the court of appeals below. Indeed, the very authorities under the Hobbs Act relied upon below were relied upon by the Solicitor General in *Stirone*.[13]

2. The holding below, if allowed to stand, creates a conflict with rulings of this Court and courts of appeals prohibiting direction of a verdict in a criminal case. It threatens, if followed as precedent, to undermine the right of federal criminal defendants generally to a jury trial on the jurisdictional element of a federal offense—at least in any case where the trial

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267 F.2d 512, 515 (3d Cir. 1959); *United States* v. *Donovan*, 339 F.2d 404, 410 (7th Cir. 1964). As applied to these cases, the statement that "the question of what activities constitute an 'industry affecting commerce' under 29 U.S.C. § 186 has almost always been regarded as a question of law for the Court to decide" (App. 4a) means only that the judge gives such an instruction to the jury. It does not mean that the jurisdictional element need not be submitted to the jury at all.

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[13] The opinion below relied upon five cases under the Hobbs Act: *United States* v. *Green*, 246 F.2d 155, 160-61 (7th Cir.), *cert. denied*, 355 U.S. 871 (1957); *United States* v. *Lowe*, 234 F.2d 919, 922 (3d Cir.), *cert. denied*, 352 U.S. 838 (1956); *United States* v. *Varlack*, 225 F.2d 665, 670, 672 (2d Cir. 1955); *Hulahan* v. *United States*, 214 F.2d 441, 445-46 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954); *Nick* v. *United States*, 122 F.2d 660, 673 (8th Cir.), *cert. denied*, 314 U.S. 687 (1941). (App. 4a.)

The first four of these cases were cited by the Solicitor General in *Stirone* in the footnote at p. 17 of his brief, n. 2, quoted in this petition, *supra*. The remaining case, *Nick* v. *United States*, *supra*, was not cited by the Solicitor General on the same point, but was cited elsewhere in his brief, at p. 28.

United States v. *Lowe*, *supra*, is also relied upon in the Solicitor General's Brief in Opposition in *United States* v. *Ricciardi*, No. 1171, Oct. Term 1965, p. 8, n. 6.

judge considers the evidence of this element undisputed or indisputable. Since the federal courts are courts of limited jurisdiction, potentially this holding affects the right to jury trial in every federal criminal case.

In *Stirone* the government "assume[d] that it is appropriate to submit to the jury for its determination any factual issue which may underlie the determination as to effect upon interstate commerce." A footnote explained: "This is characteristically done by charging a jury, '*if you believe* that such and such transactions took place, then I charge you as a matter of law that there was an effect upon interstate commerce.'" *Stirone* v. *United States, supra,* Brief for the United States at p. 17 and n. 2 (emphasis supplied). In the criminal cases relied upon by the court below, by the government in *Stirone,* and by the government in its Brief in Opposition in *Ricciardi,* an instruction of this type was given. (See App. 4a; Brief for the United States in *Stirone,* pp. 16-19, quoted *supra; Ricciardi* v. *United States,* No. 1171, Oct. Term 1965, Brief in Opposition, n. 4 and n. 6.) In none of those cases did the trial court withhold from the jury the question of whether the government's evidence on the jurisdictional issue should be believed. In each of them the jury's verdict, under the instructions given, established that the jury had believed the government's evidence on this issue.

In the instant case there is no way of knowing whether the jury believed the evidence relating the union's activities to the volume of consumption and purchase of out-of-state fuel. For under the instructions given on the jurisdictional element (R. 150a-51a) —and held erroneous by the court of appeals (App.

9a-10a)—the jury was free to convict if it believed that the horses used at Yonkers Raceway crossed state lines, or that the merchandise at Klien's department store came from out of state. As in *Stirone*, it cannot be gainsaid that the verdict may have been predicated upon one of these erroneous theories of jurisdiction submitted to the jury.[14]

For this reason the court of appeals, in order to affirm, had to adopt the extreme position that the issue should not have been submitted to the jury at all. In order to justify this position, the majority opinion argues that testimony upon which it relies to establish jurisdiction was given "without contradiction" (App. 10a). But this testimony, given by the local union president, Chartier, as to the number and responsibilities of the superintendents organized by the union (App. 10a),[15] was not immune from jury disbelief.[16] Nor was the jury required to place the same interpretation as the court of appeals' majority upon Chartier's ambiguous testimony that the superintendents

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[14] This is apart from petitioner's contention that here, unlike *Stirone*, no correct theory of jurisdiction was submitted to the jury along with the incorrect one. For here, unlike Judge Weinfeld's charge in *Ricciardi*, the jury was not told that, in order to predicate jurisdiction on the landlords' interstate fuel purchases, it would have to find that a superintendents' strike would diminish these. (See App. 9a-10a, 23a-25a.)

[15] For purposes of this portion of the argument petitioner assumes *arguendo* that the evidence cited by the appellate court, if believed, would prove facts sufficient to establish jurisdiction. But as noted below, additional facts were needed to establish jurisdiction—facts which the appellate court judicially noticed concerning the effect of a superintendents' strike.

[16] The government apparently does not vouch for Chartier's impeccability, since it has subsequently indicted him on a similar charge. *United States* v. *Chartier*, 65 Cr. 409 (S.D.N.Y.).

"service the heat"—whatever that means (the phrase was the prosecutor's, not Chartier's, see R. 31a). Surely a juror was free to give this testimony the more limited interpretation indicated by Judge Waterman (see App. 24a), or some different interpretation of the juror's own.

In holding that testimony given "without contradiction" removes the need for a jury determination of the jurisdictional element of a federal offense, the opinion below contravenes *Stirone*. There too the government argued that "there was uncontroverted testimony" establishing the jurisdictional facts, and "no contested issue of fact underlying the jurisdictional issue" (Brief for the United States, p. 18). The argument that this made a jury determination unnecessary was rejected by this Court.

The opinion below is also in conflict with the holding of the Third Circuit, that undisputed evidence of the interstate commerce element of an offense may still be rejected by the jury. In *United States* v. *Gollin*, 166 F. 2d 123 (3d Cir. 1948), *cert. denied*, 333 U.S. 875 (1948), defendants were convicted of theft from an interstate shipment. The district court had ruled, and had instructed the jury:

> "Under this state of facts you are instructed that as a matter of law the truck was moving in interstate commerce at the time it is contended by the government that the beer was stolen therefrom. That is a matter of law. The facts are not disputed and that constitutes the jurisdiction of this court and is a matter for the court to determine and not a matter for the jury to determine." *Id.* at 125.

The Third Circuit reversed because of the infringement of the right of jury trial. It agreed:

> "It is true that the evidence pertaining to the interstate commerce status of the truck and its shipment was uncontradicted." *Id.* at 125.

But it reversed because the district court's action

> "really brought about a partial direction of verdict against these defendants in this criminal trial and on an indispensable part of the proofs.
>
> The District Judge was without power to direct a verdict of guilty although no fact might have been in dispute. . . . [citing authorities] And what the judge is forbidden to do directly he may not do by indirection." *Id.* at 126-27.

In reasoning that the jury misdirection in the instant case was harmless because of "the undisputed evidence", the court of appeals ignored its own recent observation:

> "The government does not, of course, deny that the issue of wilfulness was *disputed in the sense that it had to be submitted to the jury* since, absent a concession, there can never be a directed verdict for the prosecution on any issue in a criminal case." *United States* v. *Markis,* 352 F. 2d 860, 867 (2d Cir. 1965, per Circuit Judges Friendly, Waterman and Smith; emphasis supplied.)

The foregoing statement accords with the unanimous weight of federal authority. "For a judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 408 (1947). See, *e.g., Schwachter* v. *United States,* 237 F. 2d 640, 644 (6th

Cir. 1956); *Edwards* v. *United States*, 286 F. 2d 681, 683 (5th Cir. 1961); 5 WHARTON, CRIMINAL LAW AND PROCEDURE 230 (1957).

The holding below goes even further than the direction of a verdict upon "conclusive . . . evidence." For concededly the record was devoid of evidence of essential facts—of "any testimony to the effect that a strike or slow-down by the superintendents would affect the purchase of fuel used in these buildings." (App. 10a.) The court therefore found it necessary to take judicial notice: "that a slow-down or strike by the superintendents who run the heating systems would affect the amount of fuel used in the buildings in a significant way." (App. 10a-11a) This action was said to be "judicial notice of the obvious and the indisputable." (App. 10a.) It accorded with the position advanced by the government for the first time on appeal:

> "It is of no import that no testimony was offered as to the conclusion that a labor dispute involving the superintendents would affect the flow of fuel in interstate commerce. The effect of such a dispute would be clear: a walkout by the superintendents would result in a failure to provide heat, diminishing use of concededly out of state fuels. Testimony of this truism would add nothing to the record." (Brief for the United States below, p. 10.)

Of course what the government calls a "truism" and the appellate court majority deems "indisputable" can be disputed by reasonable men: it was disputed by the concurring judge on the court of appeals (App. 23a-24a).

The lack of unanimity as to the assertedly "indisputable" facts among the judges of the court of appeals is the surest evidence that a jury need not have found unanimously and beyond a reasonable doubt "that a slowdown or strike by the superintendents who run the heating systems would affect the amount of fuel used in the buildings in a significant way." Although the appellate majority believed that this effect was familiar to "every one else" (App. 10a), Judge Waterman indicated that it was not familiar to him (App. 24a). A juror too might have been "ignorant" (App. 10a) of the asserted effect.

But even if the question were one on which judges were unanimous in their understanding, it would undermine the constitutional principle of the right to jury trial if on that account the issue were taken from the jury. What the majority opnion says, in effect, is that Judge Murphy should have directed the jury to find "that a slowdown or strike by the superintendents who run the heating systems would affect the amount of fuel used in the buildings in a significant way." To direct the jury so to find in the conceded absence of any evidence in the record of the effects of a slowdown or strike by the superintendents, and in the face of a stipulation that "the appropriate witnesses", if called, could not testify whether the union's activities affected the volume of fuels purchased or consumed and knew of no source of such information (R. 183a; 85a), would be remarkable even in a civil case. Such a direction in a criminal case must, *pro tanto,* violate the rule prohibiting the direction of a verdict against a criminal defendant.

The logic of the opinion below would appear to extend to any element of any federal offense. It would authorize the trial judge to determine "as a matter of law" the existence of any element upon which he deemed the evidence "undisputed", or which he judicially noticed was "indisputable." Where the defense offered no evidence, the jury might often be superfluous.

But even if the holding below is confined to cases where the determination of federal criminal jurisdiction rests upon proof of a connection with interstate commerce, its potential application is of great magnitude. For example, in the four-year period from 1962 through 1965, criminal prosecutions under the Taft-Hartley Act, under which petitioner was prosecuted, numbered 58; prosecutions under the Hobbs Act and other federal statutes governing extortion, racketeering and threats numbered 435; prosecutions under the National Motor Vehicle Theft Act (involved in *Schwachter* v. *United States, supra*) numbered 19,971; prosecutions for larceny from interstate shipments (involved in *United States* v. *Gollin, supra*) numbered 2,333. Annual Report of the Director of the Administrative Office of the United States Courts, 1965, Table D-2. In recent years Congress has relied on its powers of regulation of interstate commerce to expand the areas of federal criminal jurisdiction. See, *e.g.*, 18 U.S.C. §§ 1084 and 1952, enacted in 1961. The commerce power may also afford the basis for increasing numbers of federal criminal prosecutions in the civil rights area. See *United States* v. *Guest*, 34 U.S. LAW WEEK 4323, 4326 (Sup. Ct., March 28, 1966). The lower courts should have this Court's guidance as to whether the jurisdictional element of such offenses

should be submitted to the jury,[17] or whether the decision below shall stand as a precedent for keeping the jurisdictional issue from the jury where the trial or appellate court deems the evidence "undisputed".

3. The appellate court's substitution of its "judicial notice" for a jury verdict on the "obvious and indisputable" facts not only deprived petitioner of his right to jury trial, as argued above. Even assuming *arguendo* that the court of appeals correctly held that the jurisdictional issue was for the trial court instead of the jury, its own judicial notice-taking violated petitioner's Fifth and Sixth Amendment rights to due process, cross-examination and confrontation, and to offer testimony in his own behalf. The appellate court's action is absolutely contrary to this Court's ruling in *Garner* v. *Louisiana*, 368 U.S. 157, 173 (1961).

Garner held that due process would be violated by taking judicial notice on appeal of facts essential to sustain a conviction, *where those facts had not been judicially noticed by the trial judge.* In *Garner* the

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[17] In the case of prosecutions under the Taft-Hartley Act, 29 U.S.C. § 186, the government itself appears unresolved as to whether the jurisdictional issue should be submitted to the jury. In its Brief in Opposition in *Ricciardi, supra* (pp. 6-7 and n. 4), the government suggests that Judge Weinfeld submitted to the jury a "jurisdictional question" which courts of two other Circuits have treated "as a question of law". The government does not indicate which of the alternative approaches it considers erroneous. See *ibid.* However, it should be noted that in the two cases cited by the government as *contra* to Judge Weinfeld, the jury was permitted by the instructions to accept or reject the prosecution's evidence on the jurisdictional element. See *United States* v. *Gibas*, 300 F.2d 836, 839 (7th Cir.), *cert. denied*, 371 U.S. 817 (1962); *United States* v. *Pecora*, 173 F. Supp. 764, 766 (W.D. Pa. 1958), *affirmed*, 267 F.2d 512, 515 (3d Cir. 1959).

petitioners had been convicted in a non-jury trial. This Court rejected the respondent's contention that the trial court had taken judicial notice of the facts upon which respondent relied to sustain the convictions:

> "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. *To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial,* and would be 'to turn the doctrine into a pretext for dispensing with a trial.' *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U.S. 292, 302. Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon." *Id.* at 173 (emphasis supplied).

Likewise, the decision of the court of appeals herein, to accept the facts first urged as a "truism" by the prosecution on appeal, "allow[ed] the prosecution to do through argument to [the court of appeals] what it is required by due process to do at the trial. . . ." Petitioner was thereby "deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts" which were judicially noticed by majority vote of the appellate court.

The instant case is even more aggravated than *Garner.* For there a state statute—of which defendants' counsel presumably had notice—expressly au-

thorized the state courts to take judicial notice of the facts as to racial and social conditions relied upon to sustain the conviction. *Id.* at 173 and n. 26. Here, in a federal criminal case, it is doubtful that judicial notice by the trial court could relieve the government of its burden of proving the effect of a superintendents' strike, without violating Fifth Amendment guarantees of due process and Sixth Amendment guarantees of confrontation and cross-examination. But at all events it is clear that such judicial notice could do no more than relieve the government of its burden of proving that a superintendents' strike would decrease the demand for and interstate shipments of fuel. To deny petitioner an opportunity to present countervailing evidence would be a flagrant violation of due process and of his Sixth Amendment right to obtain "witnesses in his favor". Yet precisely this result was achieved by the appellate court's taking judicial notice of strike effects not judicially noticed by the district judge.

Had Judge Murphy been asked to and agreed to take judicial notice of the facts which the appellate court termed "indisputable" (App. 10a), petitioner plainly would have been entitled to an opportunity to offer evidence disputing them. As Judge Learned Hand has stated for the court below:

> "Facts which a court may judicially 'notice' do not, for that reason, become indisputable." *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 446 (2d Cir. 1945).

Wigmore makes the same point:

> "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have

> done so . . . *But* the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable." IX Wigmore, Evidence § 2567 (3d ed. 1940) (emphasis in original).

Justice Cardozo adopted Wigmore's formulation for this Court:

> "[Judicial] notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. *Wigmore, Evidence,* 16th ed. p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' *Ibid.*" *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U.S. 292, 301-02 (1937).

The unfairness peculiar to taking judicial notice for the first time on appeal is shown by Professor Morgan, in an article relied upon below (App. 7a):

> "When the resort to judicial notice is first made manifest in the opinion of the court of last resort, it is usually too late to take corrective measures. In reading data garnered from text books or encyclopedias . . . set out in an opinion of a court of last resort, one often has a feeling that they might have been contradicted or modified or explained by diligent counsel aware that the court intended to use them." Morgan, *Judicial Notice,* 57 Harv. L. Rev. 269, 293 (1944).

The action of the court of appeals, in depriving petitioner of a trial before judge or jury on the issue of the effect of a superintendents' strike, is contrary to a host of other recent decisions of this Court. Twice last year the Court stated:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least

> that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner* v. *Louisiana,* 379 U.S. 466, 472-73 (1965); *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965).

In the instant case there was no "evidence developed" of the effect of a superintendents' strike, "from the witness stand in a public courtroom" or elsewhere; instead there was "judicial notice" recited in an opinion of an appellate court where defendants have no "right of confrontation, of cross-examination". The only "witnesses" as to a strike's effect being the members of the appellate panel, petitioner lost his due process right, "as a minimum . . . to examine the witness against him, to offer testimony." *Pointer* v. *Texas, supra,* at 405, quoting *In Re Oliver,* 333 U.S. 257, 273 (1948). The right of confrontation and cross-examination asserted in *Pointer* was this term reiterated in *Brookhart* v. *Janis,* No. 657, Oct. Term, 1965, 34 U. S. LAW WEEK 4351 (April 18, 1966). In the latter case this Court held that the defendant was deprived of his rights to confrontation and cross-examination where his counsel agreed not to cross-examine the witnesses whose testimony was offered to prove "each of the essential elements of the crime." The instant case is more aggravated, since the government failed even to offer evidence of essential facts, but filled the gap through "judicial notice" by the court of appeals where cross-examination was impossible.

Under this Court's rules certiorari is appropriate, "Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's

power of supervision." Rule 19(b), Supreme Court Rules. Petitioner respectfully submits that the action of the Court below in substituting its judicial notice for trial of facts before a judge or jury in a criminal case, plainly brings this case within Rule 19(b).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: May 10, 1966

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APPENDIX

APPENDIX

Opinions of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 135 & 146—September Term, 1965.
(Argued November 15, 1965 Decided February 4, 1966.)
Docket Nos. 29796 & 30015

Docket No. 29796
UNITED STATES OF AMERICA,

Appellee,

—v.—

VINCENT J. RICCIARDI,

Appellant.

Docket No. 30015
UNITED STATES OF AMERICA,

Appellee,

—v.—

STANLEY M. UNGER,

Appellant.

Before:

MEDINA, WATERMAN and MOORE,
Circuit Judges.

Appeals from judgments of conviction for violations of 29 U. S. C. § 186, entered on jury verdicts of guilty after trials in the United States District Court for the Southern District of New York, Thomas F. Murphy and Edward Weinfeld, *Judges.* Affirmed.

GEORGE WOLF, New York, N. Y., *for the appellant Ricciardi.*

VINCENT J. FULLER, Washington, D. C. (Robert L. Weinberg, Washington, D. C., with him on the brief), *for the appellant Unger.*

NEIL PECK, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Richard A. Givens and Douglas S. Liebhafsky, Assistant United States Attorneys, on the brief), *for the appellee.*

MOORE, *Circuit Judge:*

In 1964 Vincent J. Ricciardi and Stanley M. Unger, Vice-President and Secretary-Treasurer, respectively, of Local 32-E of the Building Service Employees International Union, both were indicted under 29 U. S. C. § 186 for knowingly demanding and receiving money from employers of whose employees Ricciardi and Unger were representatives. During the years in question, Local 32-E had approximately 8,000 members, most of them building superintendents of apartment houses in Bronx and Westchester Counties, New York, but some of them employed in various country clubs in the area, at race tracks, in a department store, and in an amusement park. Unger worked primarily for Local 32-E itself; Ricciardi was in charge of Council 7, a subdivision of Local 32-E representing employees in small apartment buildings, generally with 30 or less apartments.

The employers who made the payments which were the subject of the indictments against Ricciardi and Unger were owners of apartment houses in the Bronx.

After trial before Judge Weinfeld, the jury found Ricciardi guilty on fifteen counts. He was sentenced to one year on each of the first fourteen, the sentence to be served concurrently, and was given a suspended sentence of one year on the fifteenth count. After trial before Judge Murphy, the jury found Unger guilty on three counts. He was sentenced to one year on each count, the sentences to be served concurrently.

Ricciardi and Unger were tried separately. In the appeals before us, Ricciardi challenges only the existence of jurisdiction under the statute; Unger challenges not only the existence of jurisdiction but also the indictment, the trial court's construction of the substantive provisions of the statute, and the sufficiency of the evidence under the substantive provisions of the statute.

I. *Jurisdiction Under the Statute.*

The indictments against both Ricciardi and Unger were phrased in terms of subsections (b)(1) and (a)(1) of 29 U. S. C. § 186. Read together, the two subsections make it unlawful "to request, demand, receive, or accept . . . any payment, loan, or delivery of any money or other thing of value," 29 U. S. C. § 186(b)(1), from an employer "to any representative of any of his employees who are employed in an industry affecting commerce . . .," 29 U. S. C. § 186 (a)(1). The jurisdictional test for the cases against both appellants is therefore: are any of the employees of the

employers who made the payments "employed in an industry affecting commerce"? 29 U. S. C. § 142(1) defines "industry affecting commerce" as "any industry or activity in commerce or which a labor dispute would burden or obstruct commerce or the free flow of commerce"; and "commerce" in turn is defined by 29 U. S. C. § 152(6) to mean "trade . . . among the several States . . ."

Although in both cases now before us the jurisdictional question was submitted to the jury, the question of what activities constitute an "industry affecting commerce" under 29 U. S. C. § 186 has almost always been regarded as a question of law for the court to decide, leaving to the jury only the determination of what activities the defendant had in fact engaged in. *United States* v. *Gibas*, 300 F. 2d 836, 839 (7th Cir.), *cert. denied*, 371 U.S. 817 (1962); *United States* v. *Pecora*, 173 F. Supp. 764 (W. D. Pa. 1958), *aff'd* 267 F. 2d 512 (3d Cir. 1959); see *United States* v. *Donovan*, 339 F. 2d 404, 410 (7th Cir. 1964). The same allocation of function between court and jury has also been made under the similar Hobbs Act, 18 U.S.C. § 1951, which proscribes the obstruction of commerce by robbery or extortion. *United States* v. *Green*, 246 F. 2d 155, 160-61 (7th Cir.), *cert. denied*, 355 U.S. 871 (1957); *United States* v. *Lowe*, 234 F. 2d 919, 922 (3d Cir.), *cert. denied*, 352 U.S. 838 (1956); *United States* v. *Varlack*, 225 F. 2d 665, 670, 672 (2d Cir. 1955); *Hulahan* v. *United States*, 214 F. 2d 441, 445-446 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954); *Nick* v. *United States*, 122 F. 2d 660, 673 (8th Cir.); *cert. denied*, 314 U.S. 687 (1941).

A. *Ricciardi.*

Ricciardi maintains, not that the submission to the jury of the jurisdictional question was prejudicial to him, but that improper standards were used to resolve the question and that there was insufficient evidence to support a finding that the employees worked in an "industry affecting commerce."

Ricciardi claims in particular that a charge should have been given to the effect that the exclusive handling by the New York State Labor Board of labor disputes in multiple dwellings was evidence that the operation of such buildings did not affect interstate commerce. We disagree and hold that the trial judge was under no obligation to tell the jury to consider what the New York Board thought its jurisdiction was, in determining whether the operation of the buildings "affects commerce."

Nor did the trial judge err in instructing the jury that it could consider that the industry in question included all apartment houses in the Bronx with 30 or less apartments, whether or not they had contracts with Council 7 of Local 32-E. The general stautory definition in 29 U. S. C. §142 (1) makes clear that an industry may be one "affecting commerce" if a labor dispute in the industry would tend to burden commerce. To apply this jurisdictional test, the relevant industry must first be determined. 29 U. S. C. §186(a)(1) and (b)(1) prohibit payment and the receipt of payment from an employer "to any representative of any of his employees who are employed in an industry affecting commerce." To confine the term "industry" to the business activities of the employers who made the allegedly unlawful

payments, or to the business activities of employers whose employees were represented by the recipients of such payments from employers, would be contrary to the broad connotations of the term "industry." Instead, the relevant industry for the purposes of 29 U. S. C. § 186(a)(1) and (b)(1) comprises all business activities in the same field as the business activities of employers whose employees were represented by the recipients of the allegedly unlawful payments. Applying this test, it was not error for the trial court to instruct the jury that the relevant industry was "the ownership, operation and management of apartment houses in the Bronx of 30 or less apartments."

Ricciardi's challenge to the sufficiency of the evidence of jurisdiction must also fail. There was no dispute that the superintendents represented by Local 32-E ran the furnaces for their buildings, nor that the fuel for those furnaces, although purchased from local distributors, came ultimately from out of state. Ricciardi argues that the amount of fuel used in the small apartment houses in the Bronx whose owners made payments to him was so small that it could have no "significant effect upon the stream of commerce," and could not deflect its flow "by so much as a microscopic ripple." But the President of Local 32-E and Ricciardi himself testified that in 1959 Council 7 of Local 32-E, the subdivision headed by Ricciardi, represented employees in between 700 and 1,000 buildings with 30 or less apartments. A number of employers who made pay-offs to Ricciardi testified that their fuel bills ran from $1,200 (for a 20-unit building) to $4,500 (for a 28-unit building) a year; and no evidence was offered by Riciardi which would

indicate that these figures were not representative of the industry.

To be sure, there was no testimony which said in so many words that a strike by the superintendents of the buildings with 30 or less units, who were represented by Council 7 of Local 32-E, would tend to curtail interstate commerce; but the Government should not be penalized for its failure to belabor the obvious. As Mr. Justice Metcalf wrote in *Commonwealth* v. *Peckham,* 68 Mass. (2 Gray) 514, 515 (1854): "Jurors are not to be presumed ignorant of what everybody else knows. And they are allowed to act upon matters within their general knowledge, without any testimony on those matters." See also *Rostade* v. *Portland R'y, Light & Power Co.,* 101 Ore. 569, 581, 201 Pac. 184, 188 (1921) ("triers of fact cannot, in the nature of things, be divested of general knowledge of practical affairs"); McCormick, Evidence § 324 at p. 691 (1954); 9 Wigmore, Evidence § 2569 (3d ed. 1940); Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 272 (1944). If a jury does not need to be told that gin is intoxicating, *Commonwealth* v. *Peckham, supra,* or that good rugs are valuable, *Shikany* v. *Salt Creek Transp. Co.,* 48 Wyo. 190, 45 P. 2d 645 (1935); or that spare parts were difficult to obtain in this country during 1943 and 1944, *Holt* v. *Pariser,* 161 Pa. Super. 315, 54 A. 2d 89 (1947), the jury here did not need to be told that a strike or a slow-down by employees who run machines would affect the amount of material used in the machines. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469 (1940). To paraphrase Rule 9 of the Uniform Rules of Evidence, the proposition is one of generalized knowledge so universally known that it cannot reasonably be the subject

of dispute. The jury could apply this proposition to the testimony before it as to the responsibilities of the building superintendents and as to the amount of fuel used in the buildings, and conclude that a labor dispute in the industry would interfere with the sale or distribution of out-of-state fuel on other than a *de minimis* basis.

The Supreme Court has repeatedly said that in passing the National Labor Relations Act, Congress intended the coverage of the Act to reach to "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Oil Co.*, 371 U.S. 224, 226 (1963); see *Guss* v. *Utah Labor Relations Bd.*, 353 U.S. 1, 3 (1957). The same may fairly be said of the congressional intent as to the statute now under consideration, since the Labor-Management Relations Act of 1947, of which the predecessor of the present 29 U. S. C. § 186 was a part, referred to the definition of "commerce" used in the National Labor Relations Act, see 29 U. S. C. § 142(3), and since the definition of "industry affecting commerce" in the new act, 29 U. S. C. § 142(1), closely parallels the definition of "affecting commerce" in the National Labor Relations Act, 29 U. S. C. § 152(7). On the basis of evidence introduced by the Government and common knowledge as to the effects of strikes and slow-downs, there is no question but that the activities here in question fall within the permissible reach of the commerce clause. See *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (Civil Rights Act of 1964, as applied to a restaurant buying less than half its food supplies—some $69,683 a year—from out of state, held constitutional); *Wickard* v. *Filburn*, 317 U.S. 111

(1942) (Congress under the commerce clause can set limits to wheat production even if the farmer consumes all of his own production on his farm); *United States* v. *Darby,* 312 U.S. 100 (1941); *NLRB* v. *Fainblatt,* 306 U.S. 601 (1939).

We hold that proper standards were used to resolve the jurisdictional question and that there was sufficient evidence of jurisdiction under the statute in Ricciardi's case.

B. *Unger.*

Unger's challenge to jurisdiction under the statute raises somewhat different problems than Ricciardi's similar challenge, since different evidence was introduced in support of jurisdiction and since the trial judge's conception of the proper jurisdictional test differed from the test used by the judge before whom Ricciardi was tried.

The indictment against Unger was couched in terms of 29 U. S. C. §186(a)(1) and (b)(1), under which the correct jurisdictional test is: are any of the employees of the employers who made the payments "employed in an industry affecting commerce"? This was the test employed by the trial judge in Ricciardi's case. In Unger's case, however, the trial judge denied a requested charge to this effect, and charged instead that the test is "whether the employers of all the employees in the union are in an industry affecting commerce." The charge given permitted the jury to consider on the question of jurisdiction not only the fuel purchased by the apartment houses but also the out-of-state aspects of the racetracks and the department store at which members of other branches of Local 32-E were employed.

We believe that this instruction, although erroneous, was not prejudicial to Unger, because the undisputed evidence establishes jurisdiction under the statute as a matter of law.

The president of Local 32-E testified without contradiction that this local, which represented employees of the employers who made the payments to Unger, had organized approximately 5,500 apartment buildings in Bronx and Westchester Counties by 1959; that members of Local 32-E were superintendents of these buildings; and that the superintendents were responsible for servicing the heating systems in the buildings. It was stipulated between the parties that the oil, coal, and gas used as fuel in the buildings, although purchased from local distributors, came from outside of New York State.

The Government adduced no proof of the dollar volume of the fuel consumed in apartment buildings organized by Local 32-E; nor was there any testimony to the effect that a strike or slow-down by the superintendents would affect the purchase of fuel used in these buildings. But in the words of Coleridge, *J.*, "Judges are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with." *Lumley* v. *Gye*, 2 El. & Bl. 216, 267, 118 Eng. Rep. 749, 768 (Q. B. 1853). In deciding what constitutes an "industry affecting commerce" as a matter of law, we may take judicial notice of the obvious and the indisputable. It cannot be disputed that the amount of fuel used in 5,500 apartment buildings is substantial, and has a substantial dollar value. Nor can it be disputed that a slow-down or strike by the superintend-

ents who run the heating systems would affect the amount of fuel used in the buildings in a significant way. Of course we cannot decide whether the effect would be long-lasting: the record affords no information, nor is it common knowledge, whether labor disputes in the apartment building industry in the Bronx and in Westchester are long-lasting, or whether landlords could run the furnaces themselves or get outside help in running them. But we need not decide that the effect upon interstate commerce would be drastic, before we can hold that the Government has satisfied the jurisdictional requirements of the statute. The statute requires only that a labor dispute in the industry would "tend to burden or obstruct" interstate commerce, 29 U. S. C. § 142(1). Interpreting this phrase in light of the congressional intent that jurisdiction under the statute should be as broad as constitutionally permissible, jurisdiction is established as a matter of law if there is no question but that a labor dispute in the relevant industry would have a palpable effect on interstate commerce. Given the unquestioned evidence of the number of buildings involved and the responsibilities of the superintendents, we can take judicial notice that a labor dispute involving the apartment buildings would have a palpable effect on interstate commerce.

We find support for our action in a long series of cases in which federal courts have taken judicial notice of indisputable facts in appraising the effect of given activities upon interstate commerce. As the Supreme Court said in one of the turning-point cases during the era popularly referred to as the New Deal, effects on interstate commerce

"must be appraised by a judgment that does not ignore actual experience." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937). In *Murray* v. *Union Pacific R.R.*, 77 F. Supp. 613 (N.D. Ill. 1948), the court took judicial notice of the nature of the defendant railroad's activities in Illinois, in deciding that service of process upon the defendant in Illinois did not improperly burden interstate commerce. In *NLRB* v. *Vulcan Forging Co.*, 188 F. 2d 927 (6th Cir. 1951), the court held that in determining whether the NLRB had jurisdiction over a company which sold all of its output to Ford Motor Company, judicial notice could be taken of the interstate activities of Ford. In *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1955), the district court took judicial notice that many of the industries served by the plaintiff bus line were interstate commerce, before it held that the activities of the bus company, although wholly intrastate, affected interstate commerce. In *Goldberg* v. *Arnold Bros. Cotton Gin Co.*, 297 F. 2d 520 (5th Cir. 1962), the Fifth Circuit stated that in considering whether cotton gin workers were engaged in the production of goods for interstate commerce, the trial court on remand could take judicial notice of the interstate movement of cotton in Texas, if it appeared to be of general knowledge and authoritatively settled. Finally, in *United States* v. *Pecora*, 267 F. 2d 512 (3rd Cir. 1959), a case arising under 29 U. S. C. § 186, the trial court had instructed the jury that if a state road being built by employees represented by the defendant "was to accommodate interstate traffic to any extent," this satisfied the jurisdictional requirements of the statute. The Third Circuit affirmed, not by approving the instruction of the trial

judge, but by taking judicial notice that the state road affected interstate commerce, since it lead into interstate highways. The court said that an actual count of the number of cars on the road bound for some point outside of the state was not necessary.

II. *The Adequacy of Unger's Indictment.*

Unger argues first that the indictment against him was defective in that it was based on inadequate evidence and should be dismissed unless the Government showed that there was sufficient evidence before the grand jury to establish the "industry affecting commerce" element of the offenses alleged. Courts are extremely reluctant to dismiss indictments because of the inadequacy or incompetence of the evidence before the grand jury. The Supreme Court has repeatedly ruled "that an indictment returned by a legally constituted nonbiased jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." *Lawn* v. *United States,* 355 U.S. 339, 349 (1958); *Costello* v. *United States,* 350 U.S. 359, 363 (1956). The refusal of a trial judge to dismiss an indictment for inadequacy of the evidence before the grand jury will be reversed only in the most unusual circumstances, as in *United States* v. *Tane,* 329 F. 2d 848 (2d Cir. 1964) (indictment rested almost exclusively on wiretap evidence). Judge Murphy acted well within the scope of his discretion in refusing to dismiss Unger's indictment on this ground.

Unger also urges that his indictment was defective in that it did not allege what "industry affecting commerce" was involved, and therefore did not give him adequate

notice to enable him to prepare his defense. As we said in *United States* v. *Varlack*, 225 F. 2d 665, 670 (2d Cir. 1955), in which we upheld a conviction under the Hobbs Act although the indictment did not allege that the "commerce" affected was "interstate commerce":

> "The indictment might well have contained a reference to the nature of the commerce affected and to the other clarifying details suggested by the appellant. The question before us, however, is not whether the indictment filed is, in all respects, the best that could have been drafted but rather, whether the omissions alluded to so completely denuded the charges of so much informative data as to deprive appellant of his right to be apprised of the charge he was required to meet and to be protected against being tried twice for the same offense. The test is a practical one and one which may be met despite the fact that the indictment could have been made more definite and certain. We are certain that the indictment filed did fulfill at least these minimal requirements."

As in the *Varlack* case, the defendant here had ample time to move for a bill of particulars to remove such doubts as he may have had about the nature of the offense charged. He did not do so. We also note that other courts have upheld against attack indictments under the same statute which merely alleged that the employer was engaged in an industry affecting commerce. *United States* v. *Inciso*, 292 F. 2d 374 (7th Cir.), *cert denied*, 368 U.S. 920 (1961); *United States* v. *Auto Rental Co.*, 187 F. Supp. 603 (W.D. Pa. 1960); *United States* v. *Lavery*, 161 F. Supp. 283 (M.D. Pa. 1958).

Unger maintains that the indictment should be dismissed as duplicitous, since it charges him with receiving payment both as a representative of employees and as an officer of a labor union, each of which is a separate offense under § 186. *United States* v. *Donovan,* 339 F. 2d 404 (7th Cir. 1964), *cert. denied,* 380 U.S. 975 (1965). Even if we were to follow *Donovan,* however, this case seems distinguishable, since the indictment made clear that it was directed at Unger's receipt of money in his capacity as a representative of employees. The indictment reads ". . . the defendant, a representative of employees who were employed in an industry affecting commerce, to-wit, Secretary-Treasurer, Local 32-E . . ." The "to-wit" indicates that Unger's union office was alleged only to specify the way in which Unger was a representative of the employees.

Nor is the indictment duplicitous for charging that Unger did "receive and accept" and did "agree to receive and accept" unlawful payments. The two clauses may state separate offenses, see *Burton* v. *United States,* 202 U.S. 344, 377 (1906); but the offenses were based on the same transactions and carried with them the same penalty, and the indictment was phrased in the conjunctive. Under these circumstances we do not think that the use of both phrases in the indictment could have confused or prejudiced Unger in his defense. See *Dranow* v. *United States,* 307 F. 2d 545 (8th Cir. 1962); *Kitchens* v. *United States,* 272 F. 2d 757, 761 (10th Cir. 1959), *cert. denied,* 362 U.S. 942 (1960); Orfield, Joinder in Federal Criminal Procedure, 26 F.R. D. 23, 33 (1960).

III. *The Trial Court's Construction of the Nonjurisdictional Elements of the Statute.*

Unger maintains that the trial court misconstrued § 186 by charging that the statute:

> does not make conscious wrongdoing a constituent of the crime; it is a criminal provision which outlaws all payments without exceptions not here involved between employer and the representative. In short, if you find that the loans were made beyond a reasonable doubt, it makes no difference whether the defendant and Jakubovitz were old personal friends or whether the defendant did not intend to do any wrong.

According to Unger, the prosecution should have to prove that the payment or loan to the employee representative was made *because* the recipient was an employee representative, and not for some other reason such as personal friendship. However, Unger can cite no case which so much as suggests that payment because of personal friendship is a defense. We think the trial court's interpretation of the statute was correct. If the Government had to prove evil motive in every case under the statute, its burden would become very much heavier. It seems reasonable to impute to Congress an intent to outlaw *all* payments, with certain narrow statutory exceptions, from employer to union official. This court so held *per curiam* in *United States* v. *Ryan*, 232 F. 2d 481, 483 (2d Cir. 1956), saying that the staute forbids payments:

> of all kinds by employers to "representatives," save as excepted . . . True, it then covers gifts, however trifling and innocuous, but we can see no reason on

> that account to narrow its scope. The penalties prescribed make it apparent that they could not have been meant as sanctions for heinous offences; and Congress may well have wished to put a stop to the practice, even on occasions inconsiderable and harmless in themselves, rather than to make verbal distinctions that would be troublesome in application. The propriety of any gift to a fiduciary with whose beneficiary the donor is apt to come into competition is surely open to scrutiny, and it is a reasonable way of dealing with the evils that may be involved to taboo all such rather than to undertake the difficult task of ascertaining the motive in every case.

Nor did the trial court err in failing to give Unger's requested charge that the jury must find Unger not guilty unless they find that Unger knew he was violating the law or acted in reckless disregard of the requirements of the law. The trial court in *United States* v. *Ryan* held that it was enough if the employee representative received money "with knowledge (1) that he was receiving or accepting money and (2) that the person who was giving him the money was an employer of employees that he represented." 128 F. Supp. 128, 133 (S. D. N. Y. 1955), *rev'd on other grounds,* 225 F. 2d 417 (2d Cir. 1955), *rev'd* 350 U.S. 299 (1956). The Supreme Court indicated that the statute was "a criminal provision, *malum prohibitum,* which outlaws all payments, with stated exceptions, between employer and representative." 350 U.S. at 305. On remand, we held *per curiam* that the statute covers "situations which do not involve conscious wrongdoing," 232 F. 2d 481, 483 (2d Cir. 1956), and referred with approval to the interpretation of the trial court. See also *United*

States v. *Keegan*, 331 F. 2d 257, 262 (7th Cir.), *cert. denied*, 379 U.S. 828 (1964).

IV. *The Sufficiency of the Evidence against Unger.*

Unger argues that, as to one of the three counts of which he was convicted, there was insufficient evidence to show that Unger took money from an employer, knowing that the money was intended for him. A little before Christmas-time, one Feiber gave Unger an envelope containing various other envelopes, each with sums of money. The envelopes were labelled with the names of various people at the union office. Unger says the evidence indicated that he took only "as a conduit for Feiber's generosity." However, Feiber testified that $50 was meant to be for Unger; and Unger himself admitted that one of the envelopes bore his name. On the basis of this testimony, the jury could well have found beyond a reasonable doubt that Unger knew that some of Feiber's money was intended for him.

V. *The Variance between the Government's Proof against Unger and the Government's Bill of Particulars.*

Unger's final argument is that the Government's bill of particulars alleged that two of the employers, Jackubovitz and Feiber, made their loans or payments "for themselves," whereas the Government's proof indicated that Jakubovitz had an interest in apartment houses only as a joint venture and that Feiber's interest in apartment houses was only as a corporate official and shareholder of corporations owning apartment houses. It is hard to see

how this variance could have prejudiced Unger. In any case any unfair surprise could have been remedied by a motion for a continuance, which was not made here. See *United States* v. *Glaze*, 313 F. 2d 757, 760 (2d Cir. 1963); *United States* v. *Burgos*, 269 F. 2d 763, 767 (2d Cir. 1959).

VI. *Conclusion.*

Both convictions must be affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result reached by the majority on the ground that proof of effect on interstate commerce is not required on a case-by-case basis in prosecutions commenced under 29 U.S.C. § 186(a) and (b).

Subsection 186(b) makes it unlawful "for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value" prohibited by subsection (a) of that section. And subsection (a)(1) prohibits an employer from making or agreeing to make any payment, loan, or delivery of money or other thing of value "to any representative of any of his employees who are employed in an industry affecting commerce . . ." 29 U. S. C. § 186(a)(1). 29 U. S. C. §142(1) states that the term "industry affecting commerce" as used in section 186 "means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." Finally, 29 U. S. C. § 152(6) states that the term "commerce" means "trade, traffic, commerce, transportation, or communication among the several

States . . .'' In brief, in order to successfully prosecute Ricciardi and Unger under Section 186(a) and (b) it was incumbent upon the Government to show that the employees of the employers who made the payments to these defendants were in an industry ''affecting'' commerce. Section 142(1) allowed the Government to make this showing by proving either that the industry or activity in which these employees were employed was itself ''in commerce'' or that a labor dispute in the industry or activity ''would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.''

In Ricciardi's case the Government did not seriously attempt to establish that the employees of the landlords who had made the payments to Ricciardi were in an industry or activity that was itself ''in commerce''; instead, the Government sought to establish that these employees were engaged in an industry or activity in which a labor dispute would burden or obstruct commerce. The trial judge ruled that the ownership, operation and management of apartment houses in the Bronx of thirty or less apartments was the relevant industry.[1] It was then established that the number of such apartment houses covered by contracts with the Union numbered between 800 and 1,000 in 1959 and that since then they had increased at the rate of approximately

[1] As Judge Moore correctly states in his opinion, the trial judge in Ricciardi's case correctly ruled that only the particular business in which the employees of the employer (or employers) named in the indictment were engaged comprised the ''industry'' pertinent to an indictment framed in terms of 29 U. S. C. § 186(a) and (b), but he also held that the jury in considering how commerce might be affected could consider the entire industry of which these businesses were but a part rather than only the business of the employers the indictment named.

300 a year so that by 1962 there were nearly 2,000 such buildings. It was also established that fuel bills in this industry ran from $1,200 (for a twenty-unit building) to $4,500 (for a twenty-eight unit building), and it was stipulated that the oil, coal and gas used as fuel in apartment buildings in the Bronx, though purchased by the landlords from local distributors, came from outside the State of New York. At the close of the Government's case, and again after all the evidence had been presented, the trial court denied the defendant's motions to dismiss the indictment and for a directed verdict of acquittal for failure of proof, and instructed the jury that: "If, upon all the evidence you find that the purchase, sale, transportation or distribution of fuel originating outside the state, and normally required by the industry, would be interefered with by a stoppage or strike, then you have sufficient upon which to find that it is an industry affecting commerce."[2] The question to be answered on appeal in Ricciardi's case is whether the trial judge erred in ruling that there was sufficient evidence to allow this issue to go to the jury.

Unger's case, as the majority notes, presents somewhat different questions; there the trial judge seems to have instructed the jury that in deciding whether the employees of the employers who made the payments to Unger were "employed in an industry affecting commeree" the jury might consider the industry or activity of all the employers

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[2] Ricciardi's case went to the jury on the single theory that even though the industry in which the employees of the landlords named in the indictment were engaged was not "in commerce" it might be said to be one "affecting commerce" if the jury could conclude that it was an industry in which a labor dispute would tend to burden commerce.

having contracts with Unger's union and that it did not have to confine its attention to the operation of multiple dwellings in the Bronx, the industry or activity of the employers mentioned in the indictment. I agree with my brothers that in so charging the jury the trial court erred; a proper charge would have limited the jury's consideration to the industry or activity of the employers mentioned in the indictment.[3]

In Unger's case the undisputed evidence established only that the union of which Unger was secretary-treasurer and which represented the employees of the employers who made the payments to Unger had organized by 1959 approximately 5,000 apartment buildings in Bronx and Westchester Counties, that members of this union were superintendents of these buildings and responsible for their heating systems, and, by stipulation, that the oil, coal and gas used as fuel in the buildings was purchased from local distributors but came from outside of New York State. There was no evidence tending to prove the dollar value of the fuel consumed in the apartment buildings organized by Unger's union. The question before us in Unger's case is whether this evidence, without more, suffices to establish that the employees of the employers who made the payments to Unger were "employed in an industry affecting commerce" as a matter of law.

It must be emphasized that at neither trial did the Government adduce any evidence tending to show that a labor dispute in the industry would in fact "affect" commerce by reducing the industry's demand for fuel. Indeed, in

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[3] See note 1, *supra*, and accompanying text.

Unger the trial judge on several occasions noted that there was no evidence relating to an effect on commerce in the case.[4]

Though in affirming both convictions the majority concedes that it was necessary for the Government to establish in each case that a labor dispute in the apartment-house industry would "affect" the industry's demand for fuel, in order to excuse the Government's failure to prove "affect" in either case, it invokes the rule that formal proof of facts known at once with certainty is not required.[5] In adopting this view of the Government's case the majority first asserts that unquestionably a strike or slowdown of superintendents who operate apartment-house heating systems would reduce the industry's demand for fuel. Stating that to be so, the majority then says that in Ricciardi's case such an obvious fact need not have been proven at trial, or submitted to the jury for resolution, since jurors would know it of their own knowledge, anyway. And in Unger's case the majority declares that it will take judicial notice of this "obvious" fact, thereby enabling it to affirm Unger's conviction according to the rules set forth in Ricciardi's case.

This approach by the majority is unsatisfactory for it collapses the distinction between two separate issues upon which the Government did not adduce proof in either case; the first is whether a labor dispute between the superintendents and the apartment-house owners would, in fact, decrease the industry's demand for fuel, the second is, assuming that it did occur, whether the decrease would be

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[4] See Appendix to Brief for Appellant, pp. 94a-95a, 132a, 163a.

[5] See McCormick, *Evidence* §§ 323-24 (1954).

more than *de minimis*. If the first issue could be affirmatively resolved from the evidence of record one could say in Ricciardi's case that the jury might rely on its own experience to conclude that in an industry comprising between 800 and 2,000 apartment buildings, each consuming more than $1,000 in fuel, the decrease would be more than *de minimis*. And assuming the first issue had been affirmatively resolved in Unger's case one could take judicial notice that the effect of the decrease on industry demand would be more than *de minimis*, even though no evidence was introduced tending to show the dollar value of the fuel consumed in the apartment buildings properly constituting the industry. However, I am not persuaded that it is common knowledge that a labor dispute in this industry would decrease the industry's demand for fuel. I should have thought it likely that all the landlords would rapidly make the minor adjustments necessary to operate the heating systems themselves; and that, if this were done, the industry's demand for fuel would not decrease. This view prevents me from attributing to Ricciardi's jury the knowledge necessary to resolve the first issue affirmatively; likewise I cannot join my brothers who believe it possible to take judicial notice of this fact.[6]

As I have pointed out, the majority assumes that in order for the Government to convict these defendants it

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[6] *United States* v. *Pecora*, 267 F. 2d 512 (3 Cir. 1959), the only case cited by the majority that arises under 29 U. S. C. § 186 and deals with the rule that well known facts need not be formally proved, is distinguishable. There is a world of difference between taking judicial notice of the proposition that "interstate highways affect interstate commerce," 267 F. 2d 512 at 515, and taking judicial notice that a janitors' strike in the Bronx would affect it to a demonstrable degree.

was necessary that the Government prove a labor dispute in the Bronx apartment-house industry would, in fact, decrease the industry's demand for fuel; the majority sustains the convictions, despite a failure of formal proof, because it concludes that formal proof of such an obvious fact is not required. I believe the convictions should be sustained on the ground that proof of effect is not required on a case-by-case basis in prosecutions commenced under 29 U. S. C. § 186(a) and (b). Persuasive authority for this position is found in several decisions construing Section 2(7) of the National Labor Relations Act, 29 U.S.C. § 152(7), which defines "affecting commerce" for purposes of that Act.[7]

In *NLRB* v. *Reliance Fuel Oil Corp.*, 297 F. 2d 94 (2 Cir. 1961), our court declined to enforce an order of the National Labor Relations Board asserting jurisdiction over Reliance Fuel Corporation, a company that sold fuel for heating purposes to New York State customers. Reliance did not make any significant out-of-state purchases, but Reliance did purchase in one calendar year fuel oil and related products valued at more than $650,000 from the Gulf Oil Corporation. Almost all of the products Reliance purchased from Gulf were refined outside of New York State and then shipped to Gulf's in-state storage facilities. Gulf in turn distributed the products to local storage tanks, one of which served the needs of Reliance. On this evidence we refused to enforce the Board's order. Our court said:

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[7] Section 2(7) of the National Labor Relations Act defines the term "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U. S. C. § 152(7).

> . . . if the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct commerce . . . 297 F. 2d 94, at 99.

Accordingly, our court remanded the case to the Board "with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce." *Ibid.* The Supreme Court in a brief *per curiam* opinion reversed the Second Circuit, *NLRB* v. *Reliance Fuel Oil Corporation,* 371 U.S. 224 (1963), stating that on the evidence of record the Board was justified in finding that "commerce" had been "affected." *Id.* at 227.

In view of the Supreme Court's opinion in *NLRB* v. *Reliance Fuel Oil Corp., supra,* it can be persuasively argued that a business not itself in interstate commerce nevertheless "affects" interstate commerce within the meaning of Section 2(7) of the National Labor Relations Act if the business makes substantial purchases of materials that have moved in interstate commerce, and that when evidence of substantial purchases of such materials has been introduced this effect has been conclusively established. See *NLRB* v. *Cross,* 346 F. 2d 165 (4 Cir.), *cert. denied,* 86 Sup. Ct. 290 (1965). And if the requisite effect on interstate commerce of a business not itself in interstate commerce can be established for purposes of Section 2(7)

merely by proving that the business purchases significant amounts of material that once moved in interstate commerce it seems to follow that effect should similarly be provable in criminal prosecutions involving industries or activities not themselves in interstate commerce commenced under 29 U. S. C. §186(a) and (b). This follows from the fact that the justification for the rule that effect need not be proved on a case-by-case basis is that there is an interest in the expeditious enforcement of federal labor policy, and from the further fact that this interest does not seem to be more worthy of consideration in unfair labor practice proceedings than it is in criminal prosecutions brought under Section 186(a) and (b). If the Supreme Court has ruled that effect may be established in unfair labor practice proceedings by proof of significant purchases of material that once moved in interstate commerce I cannot believe that it did not intend this rule also to apply in criminal proceedings brought to enforce federal labor policy. Therefore, I concur with by brothers in affirming the convictions below on the ground that the Government need not introduce evidence tending to prove that interstate commerce would be burdened by a labor dispute in an industry that is not "in commerce" but need only introduce evidence tending to show that the businesses which comprise the industry purchase significant amounts of material that once moved in interstate commerce.[8] Cf. *NLRB* v. *Cross, supra.*

[8] It might be argued that this does not dispose of Unger's case since in that case the Government introduced no evidence tending to prove the dollar value of the fuel consumed in the approximately 5,500 apartment buildings in the Bronx and Westchester organized by Unger's union. However, as I suggest in the body of my concurring opinion, I am quite willing to take judicial notice that an industry defined to include so many businesses would purchase more than a *de minimis* amount of fuel.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of February, one thousand nine hundred and sixty-six.

Present:

HON. HAROLD R. MEDINA,
" STERRY R. WATERMAN,
" LEONARD P. MOORE,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STANLEY M. UNGER,
Defendant-Appellant,

FRED MEYER, VINCENT J. RICCIARDI,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix-Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 30015

UNITED STATES OF AMERICA, *Appellee*,

v.

STANLEY M. UNGER, *Appellant*.

Before MEDINA, WATERMAN and MOORE, *Circuit Judges*.

On Petition for Rehearing

VINCENT J. FULLER,
ROBERT L. WEINBERG,
Washington, D. C.,
For Appellant.

Petition for rehearing denied.

/s/ HAROLD R. MEDINA
/s/ STERRY R. WATERMAN
/s/ LEONARD P. MOORE

U.S.C.J.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 30015

UNITED STATES OF AMERICA, *Appellee,*

v.

STANLEY M. UNGER, *Appellant.*

Petition for Rehearing in Banc

VINCENT J. FULLER and
ROBERT L. WEINBERG,
Washington, D. C.,
For Appellant.

As no active circuit judge has requested that this case be reheard in banc, and as Judge Medina, who is qualified to vote thereon by virtue of 28 U.S.C. § 43 votes to deny, the petition is denied.

s/ J. EDWARD LUMBARD
Chief Judge